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In The

Supreme Court of the United States

October Term, 1985

ARTHUR R. TAYLOR,

Petitioner,

-v-

DEBORAH BLACKWELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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106 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the terms of the settlement, in relation to which there was a material dispute as between the parties, should have been enforced without first conducting a plenary hearing; and in so doing:

(a) whether the decision of the court of appeals was in conflict with the decision of another federal court, R. 17.; and

(b) whether the decision of the court of appeals departed from the accepted and usual course of judicial proceedings, or whether it sanctioned such a departure by a lower court. R. 17.

2. Whether the request, of the appellant, for a minor reformation of the opinion below, so as to insert the word "allegedly" before the word "assaulted", should have been granted.

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OPINIONS BELOW

The opinion of the Court of Appeals, which was not reported, is reproduced in the appendix to this petition A-4. The order of the Court of Appeals in relation to the petition for a rehearing is reproduced in the appendix of this petition, A-12. The order of the Court of Appeals denying the request for a reformation of its opinion is reproduced in the appendix of this petition, A-14. The two opinions of the District Court, which are unreported, are set forth in the appendix to this petition, A-17.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was filed on March 27, 1985. The timely petition, of the defendant, for rehearing was denied by order dated May 3, 1985. The time for the defendant to file a petition for a writ of certiorari expires on June 24, 1985. 28 U.S.C. Subsec. 1254 (1) is the statutory provision that confers jurisdiction, on this Court, to review, by writ of certiorari, the opinions and orders in question.

STATEMENT OF THE CASE[1]

The matter that is presented to this court grows out of the negotiations that revolved around the attempt to settle a civil law suit. That civil law suit pertained to the attempt by the plaintiff, Deborah Blackwell, to recover damages for the allegedly assaultive behavior of the defendant, Arthur Taylor. In addition to initiating a civil action, the plaintiff also signed a criminal complaint against the defendant which was subsequently downgraded to a disorderly persons offense. The defendant filed a cross-complaint against the plaintiff charging her with a disorderly persons offense.

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[1] The Statement of the Case is based on the certifications of Stanley Schlesinger, Esq. and William J. Wolf, Esq. (A-108 & 110 of Appendix filed with Court of Appeals).

The monetary amount of the settlement in this matter was negotiated on the afternoon of May 22, 1984, in Mantoloking, New Jersey. Those settlement negotiations took place in the street outside of the Mantoloking Municipal Building. The aforesaid negotiations were conducted under the pressure that was being imposed by the municipal court judge who wanted to proceed to trial on the disorderly persons complaints. William J. Wolf, Esq. was a participant in those negotiations as was Daniel Rabinowitz, Esq., the attorney for the plaintiff, and Stanley Schlesinger, Esq., who is a close friend of the defendant as well as his personal attorney.

The negotiations of May 22, 1984, culminated in the agreement by the defendant to pay the plaintiff $40,000 and to forgive an indebtedness in the amount of $3,000. The

aforesaid sum of $40,000 was to be paid, without interest, in ten equal installments over a period of one year.

During the course of the aforesaid negotiations, Mr. Rabinowitz also advised Mr. Wolf that his client wanted an agreement, signed by the defendant, that he would not make any personal contact, either by telephone or otherwise, with her at any time in the future. In response to the request of the plaintiff for such an agreement, Mr. Wolf advised Mr. Rabinowitz that he and his client might consider the execution of such an agreement provided that there was only one such agreement, in relation to which no copies would be made, and that the original document would be kept in the vault in Mr. Wolf's office. In response to the request of Mr. Wolf to keep the sole document, evidencing

that agreement, in his vault, Mr. Rabinowitz informed him that he wanted to keep that document in his vault.

At that time, Mr. Wolf informed Mr. Rabinowitz that, after further consideration, he decided, without even conferring with his client, that it would not be appropriate to execute such a document because if the contents of that document were made public it would damage the reputation of his client and his business relationships. Furthermore, Mr. Wolf informed Mr. Rabinowitz that such an agreement was not necessary because his client had no intention of ever contacting Mr. Rabinowitz's client again because he wanted to settle this case on such terms so as to prevent any further disclosure to any of his family or business associates. In fact, the defendant, continuously expressed the opinion that his only motivation for settling this

matter was so that he could prevent himself, his family, his friends and his business associates from any further heartache as the result of any further disclosure of the alleged legal or factual contentions of the plaintiff.

In response to the suggestion of Mr. Wolf that such an agreement was not necessary if both of the parties agreed to simply leave each other alone and not publicize this matter, Mr. Schlesinger suggested that, in lieu of a written agreement, the same effect could be achieved if the Municipal Court judge was asked to admonish both parties on the record. That suggestion was accepted by Mr. Rabinowitz. The fact that Mr. Rabinowitz wanted to keep the only copy of a document in his safe serves as evidence that each party,

and their respective attorneys, understood that this entire matter was not to be publicized.

Up until this time the only agreement that had been verbally articulated was the monetary amount of the settlement, together with the way in which the principal amount of settlement would be paid. Almost simultaneously with so agreeing the parties were summoned, by court attendants, inside the courtroom; therefore, it was not possible to discuss any further terms for the settlement.

The municipal court judge, after accepting the voluntary withdrawal of each complaint, admonished both parties not to interfere, in any way, with each other at any time in the future. Thereafter, all parties with the exception of Mr. Wolf left the courtroom. By the time Mr. Wolf left the Municipal Building all parties had either

driven away or were already in their respective vehicles; therefore, it was not possible to discuss the particular terms of the releases and stipulations that would be executed by the parties.

In a letter dated May 30, 1984, that Mr. Wolf sent to Mr. Rabinowitz, he outlined nothing other than the monetary amount of the settlement, together with the terms of payment for the principal amount of settlement. That letter further referred to the fact that Stipulation of Dismissal and Settlement would be subsequently drafted and executed.

Thereafter, Mr. Wolf prepared a Stipulation of Dismissal, Stipulation of Settlement and a release. At the same time after conferring with Mr. Rabinowitz he revised the proposed form of Note that had been prepared by Mr. Rabinowitz.

When Mr. Wolf prepared the Stipulation of Settlement, he was going to insert a provision that pertained to the nondisclosure of the terms of the settlement. However, he did not include such a specific paragraph because he was of the opinion that the confidential nature of the settlement had been clearly recognized and therefore, felt no need to specifically express it in a document.

However, in order to insure that the understandings of the defendant were accurately reflected in the settlement documents, and because Mr. Schlesinger had certain discussions on May 22, 1984, with Mr. Rabinowitz and the defendant to which Mr. Wolf was not a party, Mr. Wolf included in his letter of May 29, 1984, with which he forwarded proposed forms of settlement papers to the Plaintiff's attorney, the provision

that each document, which was a draft, was subject to the review and approval of Stanley Schlesinger, Esq.

Upon receiving the set of proposed settlement documents that had been prepared by Mr. Wolf, Mr. Schlesinger called him by telephone in order to advise him that he was of the opinion that the nondisclosure provision should be expressly set forth in the settlement documents. Upon receiving the comments of Mr. Schlesinger, Mr. Wolf informed him that he saw no reason to include such a provision because the prohibition against disclosure was implicit in the terms of the settlement and in fact, was the major motivating force for the defendant to settle this matter. After listening to the comments of Mr. Wolf, Mr. Schlesinger advised him that it would not be prudent to rely on any implicit understandings and that he and the

defendant wanted that provision expressly set forth in the agreement. Mr. Schlesinger stated that, because the desire to keep the matter secret was understood by each party, there should be no reason why the plaintiff would not agree to expressly set forth such a provision in the settlement documents.

Upon being so advised by Mr. Schlesinger Mr. Wolf called Mr. Rabinowitz in order to inform him that the provision against nondisclosure must be explicitly set forth in the settlement agreements and that contrary to the plaintiff's prior position, Mr. Wolf thought it only fair that the defendant receive a grace period within which to make each periodic payment. Mr. Wolf raised the issue of a grace period because during the course of a prior discussion, Mr. Rabinowitz informed him that neither he nor the plaintiff would agree to provide a grace period in

relation to any periodic payment. Mr. Rabinowitz stated that, because a grace period had not been specifically negotiated in the street in front of Mantoloking Municipal Building, on May 22, 1984, neither he or his client would agree to such a provision.

At that time Mr. Wolf informed Mr. Rabinowitz that despite the fact that a grace period was specifically not negotiated, that as a matter of accepted practice, both as to settling cases and in common commercial practice, a grace period was always included in relation to each periodic payment and therefore, there was no specific necessity to explicitly negotiate such a term. Mr. Wolf expressed to Mr. Rabinowitz his absolute disbelief that he and his client would not agree to a grace period of fifteen days, because it was such a common practice. Mr. Wolf stated that it was always understood that

a grace period will be given so that a person will not be immediately declared in default if a periodic payment is late because of any one of a number of different circumstances, such as the failure of a deposit to clear in a timely fashion or because of an accident or other personal occurrence.

Mr. Rabinowitz advised Mr. Wolf that he would discuss the proposal of a grace period, with his client, but that at most it could only be five days. Mr. Wolf advised Mr. Rabinowitz that a five day grace period was not much better than having no grace period at all and stated that if the plaintiff could not agree to give the defendant a fifteen day grace period then at minimum they ought to split the difference and make it a ten day grace period.

As a result of those prior discussions, when Mr. Wolf called Mr. Rabinowitz after obtaining the input of Mr. Schlesinger, Mr. Wolf asked Mr. Rabinowitz to inquire as to whether the plaintiff would permit a grace period. Mr. Wolf also inquired as to whether the plaintiff would agree to include an expressed covenant that the terms of the settlement, and the underlying legal and factual basis of her claims, should not be disclosed under penalty of breaching the settlement agreement.

In response to the inquiry of Mr. Wolf, Mr. Rabinowitz informed him that he would confer with his client; however, he also asked Mr. Wolf to send him the language that he proposed. Thereafter, Mr. Wolf sent Mr. Rabinowitz a letter dated, June 18, 1984, in which he advised him that a ten day grace

period must be included and in which he suggested certain language in relation to a provision against disclosure.

When Mr. Wolf did not receive a return call from Mr. Rabinowitz, he called him, within several days of June 18, 1984, in order to inquire as to whether the language that he proposed was acceptable to him and his client. At that time Mr. Rabinowitz advised Mr. Wolf that the plaintiff would not agree to include such a nondisclosure provision because she was of the opinion that the defendant would fraudulently contend that she disclosed the terms of the agreement, or the underlying factual and legal contentions that allegedly supported her claims, and that he would use such a ruse in order to wrongfully avoid honoring his agreement to make periodic payments. Mr. Wolf informed Mr. Rabinowitz that he was reasonably certain that he could

develop language that would address the concerns of their respective clients. Mr. Rabinowitz asked Mr. Wolf to forward that proposed language to him and assured Mr. Wolf that he would discuss that proposal with his client.

At that time Mr. Rabinowitz advised Mr. Wolf that the plaintiff would only agree to such a provision if the defendant totally liquidated the agreed upon sum of $40,000 in one lump sum rather than by making periodic payments. In response to that suggestion Mr. Wolf advised Mr. Rabinowitz that the defendant had previously offered to make a lump sum payment of $30,000 but that he was, at least on May 22, 1984, not in a financial position to make a lump sum payment of $40,000. Mr. Wolf reminded Mr. Rabinowitz that the plaintiff specifically rejected the lower sum in favor of receiving $40,000 which would be

paid in ten periodic payments. At no time did Mr. Rabinowitz ever, contrary to the contention set forth in of his affidavit, ask for an additional sum, above $40,000, as consideration for including a nondisclosure statement in the settlement papers.

Pursuant to the understanding that Mr. Wolf reached with Mr. Rabinowitz, on June 25, 1984, Mr. Wolf forwarded to him proposed language which he felt addressed the respective concerns of both parties. In his discussions with Mr. Rabinowitz in relation to the nondisclosure provision, Mr. Wolf asked him not to take any legal action until he informed him as to whether the plaintiff found the language that he proposed to be acceptable to her.

Without first responding to suggestions that had been made by Mr. Wolf as to language that would be acceptable to the plaintiff, Mr.

Rabinowitz applied to the District Court for the execution of an order to show cause. (A-128)[2]. That Order to Show Cause was signed by the District Court on July 6, 1984, which was the defendant's birthday. Pursuant to the terms and provisions of that Order to Show Cause, the defendant was compelled to show cause, before the District Court on July 6, 1984, as to why an order should not be issued compelling him to execute the settlement documents. (A-27). That Order to Show Cause was supported by a brief, the affidavit of the plaintiff's attorney and the affidavit of the plaintiff. (A-41 & 51).

The defendant responded to that Order to Show Cause by filing, with the court, his own affidavit. (A-95). In addition, the defendant provided the court with the certifications of

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[2] All references to "A" are to the Appendix that was filed with the Court of Appeals.

each of his attorneys and with a brief. (A-108 & 110). Furthermore, the defendant filed a notice of cross-motion by which he sought an order enforcing the settlement but only if the settlement documents included a provision against disclosure. (A-93).

After considering oral argument on July 30, 1984, the District Court stated that it would enter an order enforcing the terms of the settlement but that it would not include a provision against non-disclosure in any of the settlement documents. After orally rendering that decision, the court advised the attorney for the plaintiff and the attorney for the defendant, that it would entertain oral arguments, by telephone, on August 1, 1984, in relation to the form and content of the order.

On August 1, 1984, it became obvious that serious issues existed as to the form and content of the order and therefore, it was mutually agreed among the court and the attorneys for the respective parties to the within action, that the arguments as to the form and content of the order should be presented in open court. As such, the District Court set August 13, 1984, as the return date for oral argument in relation to the form and content of the order. The District Court also indicated that on the aforesaid date, it would entertain the arguments of the defendant in relation to a notice of motion for reargument.

At the conclusion of the telephone conference of August 1, 1984, the District Court stated that it would enter an interim order so as to cover the time between August 1, 1984 and August 13, 1984. The court

subsequently entered an interim order which, at the request of the defendant, included a temporary restraint, on both parties, enjoining each of them from publicly disclosing any of the factual or legal contentions that formed the basis of the controversy and from disclosing the terms of the settlement. (A-152).

Thereafter, the defendant filed a notice of motion for reargument. (A-156); that application was supported by two certifications. (A-158 & 160). On August 13, 1984, the District Court entertained oral argument in relation to the motion of the defendant for reargument. After considering those oral arguments, the lower court ruled that it would not reverse, or modify, its prior decision to enforce the terms of the settlement. The District Court then entertained oral argument in relation to the

form and content of the order that it would enter and in relation to certain additional matters such as the request of the defendant for the imposition of a stay pending appeal and for the continuation of the temporary restraints that had been contained in the Interim Order of August 3, 1984. After considering the arguments of the attorneys for the respective parties to the within action, the District Court decided to stay the enforcement of the order. However, the District Court elected not to continue the temporary restraint prohibiting disclosure. The decisions of the District Court were memorialized in its order of August 14, 1984, which enforced the terms of the settlement and in its order of August 14, 1984, which stayed the enforcement of the companion order. (A-174 & 175).

Upon receiving a copy of the aforesaid two orders of August 14, 1984, the attorney for the defendant wrote advising the District Court and the plaintiff's attorney that the order did not incorporate all of the understandings that had been reached between the attorney for the plaintiff and the attorney for the defendant. In particular, the orders of August 14, 1984, did not provide that the plaintiff, as well as the defendant, was to execute the settlement documents, which included the Release that had been prepared by the attorney for the defendant. (A-177) Therefore, the attorney for the defendant prepared a supplemental order which was submitted to, and subsequently executed by, the District Court. (A-179)

Thereafter, the defendant filed a Notice of Appeal from the two orders of August 14, 1984, and the Interim Order of August 3, 1984.

In addition, the Notice of Appeal placed in issue the Order of May 24, 1984, whereby the lower court refused to dismiss the complaint because of the lack of subject matter jurisdiction. (A-180).

In conjunction with filing a Notice of Appeal, the defendant also made an application for an interim restraint, pending appeal; that application was supported by certifications and a brief. (A-181-183 & 185). By the later application the defendant sought an order mutually enjoining both the plaintiff and the defendant from disclosing any of the factual or legal allegations that form the subject matter of this law suit and from disclosing the terms of the settlement. The application of the Plaintiff for a restraint during the pendency of the appeal was denied by the Court of Appeals.

On March 27, 1985, the Court of Appeals, without entertaining oral argument, issued an opinion affirming the decision of the District Court. The decision of the Court of Appeals effectively enforced a settlement despite the fact that material elements of the settlement were in dispute. However, despite that dispute as to material elements of fact, the Court of Appeals affirmed the decision of the District Court despite the fact that it had been made without first conducting a plenary hearing.

In its written opinion the Court of Appeals affirmatively stated that the defendant assaulted the plaintiff. The Court of Appeals made that statement despite the fact that the alleged assault had never been admitted or proven. Upon receiving a copy of that opinion, the attorney for the defendant filed an objection, both in a petition for

re-hearing and in a separate letter, with the Court of Appeals. In addition, the defendant's attorney filed a petition for a re-hearing in relation to the decision of the Court of Appeals to affirm the District Court.

The request of the defendant for a re-hearing was denied by the Court of Appeals, on May 3, 1985. Thereafter, the request of the defendant for a reformation of the opinion so as to insert the word "alleged" before the word "assault" was denied on May 16, 1985.

The defendant did not elect to settle this case for the agreed upon sum of $40,000 because he was of the opinion that such a settlement was justified; in fact, contrary to the contentions of the plaintiff, and her attorney, Tongtip Bongsadadt, M.D., whom the defendant engaged as an expert witness, was of the opinion that a significant portion of the plaintiff's alleged facial discoloration was

attributable to acne or a stress related rash. Furthermore, that doctor was of the opinion that the marks on the plaintiff's face, which may have been caused by trauma, had not been caused by a trauma of great magnitude of a long duration, in other words, those marks were not evidence of a prolonged beating. It was the motivation for nondisclosure that caused the defendant to almost triple his decision not to pay more than $15,000 in order to settle this matter, and to pay considerably more than the value that either his attorneys or the Federal Magistrate had placed on the case.

The Plaintiff and her attorney apparently took the position, as they did in response to the request of Mr. Wolf to include a grace period for payment, that unless a proposal was specifically mentioned during negotiations in the street outside the Mantoloking Municipal

Building that it was not part of the bargain and therefore, should not be included in the final settlement papers. If that were true, then why would Mr. Rabinowitz and Mr. Wolf have agreed to changes in the language in the note and the release that was prepared so as to reflect the true intent of the parties or afterthoughts of respective counsel for those parties?

The fact that the finalization of language for the settlement papers was an evolutionary process is reflected by the fact that Mr. Rabinowitz wanted to add additional language to the release that Mr. Wolf prepared, which was in fact a re-draft of the release that Mr. Rabinowitz originally prepared. Therefore, Mr. Rabinowitz sought to add additional language to a release that had been prepared by him.

The Plaintiff through her attorney, asked to add language to settlement documents that were originally prepared by her own attorney. Those requests were freely granted by Mr. Wolf because Mr. Wolf was of the opinion that those requests reflected either the implicit and actual intent of the parties or because they were the reasonable type of afterthoughts that should not have been precluded by a retort, such as the one the plaintiff gave to the defendant, that if it was not specifically mentioned in the street in front of the Mantoloking Municipal Building, then it was not specifically bargained for and therefore, should be excluded from the final settlement documents.

It should be obvious from the foregoing that the defendant considered the non-disclosure of the legal and factual allegations of this controversy to be the

material consideration for his agreement to settle this case. Furthermore, it should be obvious from the foregoing that the defendant, through his attorneys, made that motive known for the attorney for the plaintiff. As such, the final version of the settlement documents should have included, at the request of the defendant, a prohibition against disclosure. Alternatively, if the plaintiff contends that the desire of the defendant for non-disclosure was not made known to her, then, in relation to the terms of the settlement, there was no meeting of the minds as between the plaintiff and the defendant. Under those factual circumstances, the settlement should not have been enforced as it was never consummated. However, in order to validly reach such a conclusion the District Court should have, because of disputed issues of material fact, conducted a plenary hearing. The refusal of

the Court of Appeals to recognize that readily accepted legal principal is in conflict with another decision of the same federal court. Furthermore, the decision of the Court of Appeals, as to the necessity of conducting a plenary hearing, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court. R. 17.

REASONS FOR GRANTING THE WRIT

1. A settlement in relation to which there is a dispute, in relation to material elements, as between the parties, should not be enforced without first conducting a plenary hearing.

Defendant-Appellant, Arthur R. Taylor, respectfully petitions this court by way of a petition for certiorari in relation to the opinion that was issued, on March 27, 1985, by the United States Court of Appeals

for the Third Circuit. In that opinion, and the subsequent order of March 27, 1985, the court elected to affirm the decision of the District Court which had entered an order enforcing the terms of a settlement despite a clear dispute as to material fact.

The Court of Appeals elected to affirm the decision of the District Court because it was of the opinion that "...essential facts relating to the settlement negotiations of May 22, 1984, were not disputed..." (Op. 6)[3]. The appellate court made the aforesaid assertion because it was of the opinion that "at no time during these [settlement] negotiations, did the subject of a confidentiality agreement arise..." (Op. 2).

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[3] References to "Op." are to the opinion of the Court of Appeals. (A-1).

The aforesaid determinations of the Court of Appeals constitute invalid conclusions. Furthermore, the aforesaid rulings of the appellate court were made despite what is a very obvious dispute as to material issues of fact.

The assertion, by the appellate court, that the issue of confidentiality was not discussed during the course of the settlement negotiations is unsupported by the record. In that regard, the certifications of the two attorneys who were representing the defendant, during the course of those negotiations, make it quite apparent that the defendant's desire for confidentiality was explicitly made known to the plaintiff's attorney. In that regard, it should be noted that the plaintiff's attorney never denied the fact that the issue of confidentiality was, in fact, discussed with him during the course of the settlement

negotiations. In fact, the desire for confidentiality appeared to be so unequivocally accepted by both parties, that the author of the initial draft of the settlement documents, although considering inserting a prohibition against disclosure, decided that such a prohibition was not necessary.

The appellate court, in an effort to circumvent an obvious dispute as to material fact, places undue reliance upon a letter, dated May 30, 1984, that the attorney for the defendant sent to the plaintiff's attorney. In the aforesaid letter, the defendant's attorney outlined solely the monetary terms of the settlement and the fact that releases and stipulations would be prepared and executed. While improperly relying on the aforesaid letter, the appellate court ignored the letter of May 29, 1984, from the defendant's

attorney, which stated that the enclosed proposed forms of settlement documents were drafts which were subject to the review and approval of the defendant and his other counsel. Upon his review of those documents, the other attorney who was representing the defendant thought, despite the clear articulation, and acknowledgment, of the desire for confidentiality that it was more prudent to include a prohibition against disclosure in the settlement documents. In that regard, all that the defendant and his attorneys sought, was a provision in the release and/or the stipulation of settlement that "neither party would disclose the terms of the settlement or the factual or legal issues that constituted their claims or defenses".

Furthermore, in rendering its decision, the appellate court ignored the fact that, on the record in open court, the plaintiff's attorney specifically stated that the plaintiff sought confidentiality and that she was concerned that the defendant would publicize the matters in controversy between them. However, despite that explicit representation that she wanted to prevent disclosure, the plaintiff has, for some inexplicable reason, refused to include a very simple, but fundamental, sentence in the settlement documents.

The affidavits and certifications that were submitted upon the behalf of the defendant clearly demonstrate that the defendant would never have agreed to settle this case unless he was assured that the terms of the settlement and the factual and legal contentions of both parties would be kept

confidential. Furthermore, the certifications and affidavits that were submitted, by the defendant, clearly show that the motivation of the defendant had been disclosed to the attorney for the plaintiff. Contrary to the contentions of the defendant, the plaintiff contends that the desire of the defendant for confidentiality had never been made known to her. Based upon the foregoing it is obvious that there is a dispute as to a material issue of fact. However, despite the aforesaid dispute of material fact the lower court summarily enforced the settlement without conducting a plenary hearing; thereafter, that decision was affirmed by the appellate court.

When a material issue of fact is in dispute, a court must conduct a plenary hearing. That fundamental legal principal has been repeatedly acknowledged by various courts in different contexts. National Labor

Relations Board v. J-Wood/A. Tappan Div., 702 F.2d 309 (3rd Cir. 1983); Hotel and Restaurant Employees and Bartenders International Union Local 54, et al., v. Martin Danziger, et al., 702 F2d 815 (3rd Cir. 1983); International Association of Machinists and Aerospace Workers v. Northwest Airlines, Inc., 673 F2d 700 (3rd Cir. 1982); Arthur Treacher's Fish & Chips, Inc. v. Mrs. Pauls Kitchen, Inc., et al., 689 F.2d 1137 (3rd Cir. 1982).

In fact, the general principal that a court must always conduct a plenary hearing when there is a disputed issue of material fact is so generally recognized that even the enforcement of a settlement is subject to that principle. In that regard the court in Hobbs & Co., Inc. v. American Investors Management, Inc. and Harry M. Weenig, 576 F.2d 29 (3rd Cir. 1978) was confronted with an application by a litigant to enforce the terms of a

settlement. In that particular case, as in the case that is currently before this court, a dispute existed as to the actual terms of the settlement. In addressing itself to the role of the district court when faced with a dispute as to the terms of a settlement, the appellate court held that:

> "[a]lthough it is well established that district courts generally have the power to enforce summarily, on motion, settlement agreements entered into with their approval, Kelly v. Greer, [365 F.2d 669 (3d Cir. 1966), cert. denied 385 U.S. 1035, 87 S.Ct. 772, 17 L.Ed.2d 682 1967], at 676, there are instances where the facts at issue are so complex or disputed that summary enforcement of the agreement is improper." id., at 34.

The court further elaborated upon the role of the district court by saying that the enforcement of a settlement by a

> ". . . summary procedure is admirably suited to situations where, ... a binding settlement bargain is conceded or shown . . . it is ill-suited to situations presenting complex factual issues related either to the formation or the consummation of the contract, which only testimonial exploration in a more plenary proceeding is apt to satisfactorily resolve . . . [Autera v. Robinson, 136 U.S. App. D.C. 216, 419 F.2d 1197 (3rd Cir. 1969)]." id., at 34.

The court in Hobbs & Co., Inc. v. American Investors Management, et al., id., recognized the fact that if a dispute exists as to the terms of the settlement, that the district court may not summarily enforce one version, or the other, of the settlement. Instead, under those circumstances the district court must conduct a plenary hearing. The district court may only summarily enforce a settlement, without first conducting a

plenary hearing, in a situation in which the exact terms of the settlement are conceded by both parties.

In the case that is currently before this court a material issue of fact exists as to exactly what constitutes the terms of the settlement. The defendant contends that a material element of the settlement was the mutual agreement not to disclose the terms of the settlement or the factual and legal issues that were asserted by either party. However, the plaintiff contends that an agreement not to publicize the aforesaid very sensitive matters was never part of the settlement. Under those circumstances the lower court should not have enforced the settlement without first conducting a plenary hearing so that it could reach a conclusion as to which, of the disputed elements, actually constituted the settlement. Therefore, the lower court

erred when it summarily enforced the settlement without conducting a plenary hearing and the appellate court erred when it affirmed the decision of the lower court. What the appellate court should have done was to recognize the factual dispute as to the terms of the settlement and then remanded this matter to the District Court for a plenary hearing in relation to the actual terms of the settlement.

The refusal of the Court of Appeals to recognize the aforesaid readily accepted legal principle is in conflict with a prior decision of the same federal court and with decisions of other circuits. Furthermore, the decision of the Court of Appeals, as to the necessity of conducting a plenary hearing, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the

Supreme Court. Due to the aforesaid circumstances, this court should, pursuant to R. 17, grant this Petition for Certiorari.

In order to preserve unity in the federal court system, there must be consistency in the decisions of the various circuits and uniformity among the individual panels within a single circuit. The Supreme Court, as the pinnacle of the federal court system, is the only court that can establish the necessary unity by enforcing consistency in the decisions of the lower courts. Therefore, because a decision of the Court of Appeals in the case sub judice is in conflict with the holding of the appellate courts in other circuits, this court has an obligation to resolve that conflict, and thereby enforce uniformity by granting this petition. See, Butner v. United States, 440 U.S. 48, 99 S.Ct. 914, 59 L. Ed. 2d. 136 (1979); Harlan, Manning

the Dikes, 13 Record N.Y.C.B.A. 541 (1958). Furthermore, because of the conflict that exists between the decision that was rendered by the Court of Appeals in the within case, and the holding that was pronounced by another panel of that same Circuit, in Hobbs & Co., Inc. v. American Investors, Management, et al., supra, this court should, in the interest of preserving a unified body of federal law, grant this petition. See, Cleveland Board of Education v. LaFleur, 414 U.S. 637, 94 S.Ct. 791, 39 L. Ed. 2d. 52 (1974). The reason for granting a petition for certiorari is to resolve conflicts among the lower federal courts so as to insure that there is uniformity in the application of federal law. As such,

> "Rule 17 does not require that the conflict involve an issue of great national importance or significance. Where a case truly contains a conflict, some distinguished commentators have contended that the

> case derives its significance from the existence of the conflict and the need for a uniform application of law. 13 Moore's Federal Practice ¶817.2."

Therefore, it has been stated that

> "[t]he rule does not speak of conflicts as to matters of importance; the element of importance lies in the fact of conflict rather than the nature of the issue." Frankfurter and Hart, The Business of the Supreme Court at October Term, 1933, 48 Harv. L. Rev. 238, 268-269 (1934).

As such, the conflict that exists in the reported body of federal decisional law as a result of the holding of the Court of Appeals in the case sub judice, even though it pertains to a matter that is not of great public concern, constitutes sufficient justification for this to grant the within petition.

The Court of Appeals, in affirming the decision of the District Court, in the within case, enforced the settlement of a civil case,

without requiring the holding of a plenary hearing despite the fact that there was a dispute, based upon the affidavits of attorneys, as to material fact. In so doing, the Court of Appeals totally ignored the time honored maxim that a plenary hearing must be held if there is a dispute as to material fact. By virtue of its ruling, the Court of Appeals clearly departed from the accepted, and usual, course of judicial proceedings. Furthermore, in so doing, the Court of Appeals sanctioned a similar departure by the District Court. Rule 17 recognizes that this court is at the pinnacle of the federal court system; as such, this court is charged with the duty to supervise the activities of the lower federal courts by monitoring their actions and making recommendations for the improvement of their operations. 13 Moore's Federal Practice, ¶817.27. Therefore, whenever an

intermediate appellate court drifts away from the accepted and usual course of judicial conduct, this court, by virtue of a petition for certiorari, must bring that court back into line.

It is obvious that by enforcing the terms of the settlement in the within case, without first conducting a plenary hearing, the Court of Appeals clearly departed from one of the most widely accepted legal maxims of the American system of juris prudence. As a result of that action, this court should grant the within petition for certiorari.

2. The request, of the appellant, for a minor reformation of the opinion below, so as to insert the word "allegedly" before the word "assaulted", should have been granted.

In its decision, the appellate court stated, in relevant part, that "...Taylor [the defendant] assaulted Blackwell [the

plaintiff]...". In reality, the complaint pertaining to a disorderly persons offense was dismissed by the municipal court and the civil action was settled without an admission of liability. Therefore, the allegation, of the plaintiff, that the defendant assaulted the plaintiff was never proven or admitted. A such, it was inappropriate for the appellate court to assert, at page 2 of its opinion, that the defendant assaulted the plaintiff; instead, the opinion should have stated that the plaintiff alleged that the defendant assaulted her, or alternatively, the opinion should have referred to the alleged assaultive behavior.

The attorney for the plaintiff objected to the reformation of the opinion of the appellate court. In a letter to the Court of Appeals, dated April 9, 1985, he contended that the alleged assault was proven. In

support of that contention the attorney for the plaintiff pointed to affidavits that had been filed in the civil proceeding. However, contrary to the contention of the plaintiff's attorney, allegations in affidavits or certifications are not proof of a contested fact. In reality the allegation of the plaintiff, that the defendant assaulted her, was never proven or admitted. Due to the fact that the aforesaid allegation was never proven or admitted, the appellate court should have reformed its opinion so as to reflect the fact that the plaintiff alleged that the defendant assaulted her.

It is incomprehensible as to why the plaintiff objected to the suggested reformation of the opinion of the appellate court. It can only be surmised that the objection of the plaintiff's attorney is indicative of the ill will that the plaintiff

harbors in relation to the defendant. It was because of that animosity, and the attendant damage to the reputation of the defendant that may be associated with it, that the defendant sought to keep the terms of the settlement and the factual and legal contentions of the plaintiff and the defendant, confidential and it is for that reason that the defendant sought a minor reformation to the opinion that was rendered by the Court of Appeals.

The allegation, of the plaintiff, that the defendant assaulted her was never proven or admitted. It is therefore, incredible that the Court of Appeals should have refused to grant the defendant's request to reform its opinion so as to insert the word "allegedly" before the word "assault". Due to the fact that the opinion of the appellate court is a public record, the reference in that opinion to an assault will be damaging to the

defendant's reputation because it may be wrongfully construed as constituting a proven fact.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Court of Appeals for the Third Circuit, in affirming the decision of the District Court, reached an erroneous conclusion of fact. That conclusion was erroneous because it is quite obvious, from the record, that there is a disputed issue of material fact as to the essential elements of the settlement agreement that was reached between the plaintiff and the defendant. Due to the fact that such a material issue of fact existed, it was encumbent upon the appellate court to remand

this matter to the District Court so that a plenary hearing could be conducted. The refusal of the Court of Appeals to recognize that readily accepted legal principal is in conflict with a prior decision of that same federal court. Furthermore, the decision of the Court of Appeals, as to the necessity of conducting a plenary hearing, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court. R. 17. In addition, there was absolutely no reason, consistent with fact, law or logic, why the Court of Appeals denied the request of the defendant for a minor reformation of its opinion so as to insert the word "alleged" before referring to an assault that had never been proven or admitted.

For these reasons, and based upon the above cited authorities, it is respectfully requested that the petition for a writ of certiorari, of the defendant, Arthur R. Taylor, should be granted.

Respectfully submitted,

William J. Wolf
Counsel of Record

Bathgate, Wegener, Wouters &
Neumann, P.C.
One Airport Road
Lakewood, NJ 08701
(201) 363-0666
Attorneys for Petitioner

June 11, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5582

DEBORAH BLACKWELL

vs.

ARTHUR R. TAYLOR,

Appellant

Appeal from the United States District Court
for the District of New Jersey - Trenton
(D.C. Civil No. 83-4645)
District Judge: Honorable John W. Bissell

Before: ALDISERT, Chief Judge, and SLOVITER, Circuit Judge, and MANSMANN, District Judge.*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on March 26, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered on August 4, 1984 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

Clerk

* Honorable Carol Los Mansmann of the united States District Court fore the Western District of Pennsylvania, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on May 13, 1985.

Test: M. Elizabeth Ferguson
Chief Deputy Clerk, United States
Court of Appeals for the Third Circuit

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5582

DEBORAH BLACKWELL

vs.

ARTHUR R. TAYLOR,

Appellant

Appeal from the United States District Court
for the District of New Jersey - Trenton
(D.C. Civil No. 83-4645)
District Judge: Honorable John W. Bissell

Submitted Under Third Circuit Rule 12(6)
March 26, 1985
Before: ALDISERT, Chief Judge, SLOVITER,
Circuit Judge, and MANSMANN, District Judge.*

(Filed: March 27, 1985)

MEMORANDUM OPINION OF THE COURT

* Honorable Carol Los Mansmann of the United States District Court for the Western District of Pennsylvania, sitting by designation.

ALDISERT, Chief Judge.

The question for decision in this diversity action is whether the district court erred in concluding that the parties had effectively settled their differences on May 22, 1984. Deborah Blackwell, a female companion of Arthur R. Taylor, appellant, filed a criminal complaint of aggravated assault and battery against him in New Jersey state court. She later filed a civil action in the United States District Court in diversity requesting compensatory and punitive damages. The predicate of the actions

occurred on November 4-5, 1983, when Taylor assaulted Blackwell in his car and at his home in New Jersey.

On May 22, 1984, Daniel Rabinowitz, a member of the firm of McCarter & English and representative for Miss Blackwell, and William Wolf, a member of the firm Bathgate, Wegener, Wouters & Neumann and representative for Mr. Taylor, entered into pretrial negotiations. The negotiating session culminated in an understanding that Taylor would pay Miss Blackwell $40,000 over a one year period, and that Taylor would immediately forgive an indebtedness of $3,000 she owed him; in return Miss Blackwell agreed to dismiss the civil action in federal court. At no time during these negotiations did the subject of a confidentiality agreement arise.

Counsel subsequently exchanged letters. The letter from Mr. Taylor's attorney on May 30, 1984 to Miss Blackwell's lawyer is significant:

> Dear Mr. Rabinowitz:
>
> I am writing this letter, to you, in order to confirm the fact that the above captioned matter has, with the mutual consent of our respective clients, been settled. Simultaneously with sending this letter to you I will forward letters to the United States District Court for the District of New Jersey advising that court that the above captioned matter should be marked as settled.
>
> This letter shall also confirm the terms of the settlement, which are as follows:
>
> A. Payment by Taylor to Blackwell of $40,000;
>
> B. The aforesaid sum of $40,000 is payable, without interest, over a period of one (1) year in ten equal installments of $4,000, the first such installment will be due and payable within ten

(10) days of the date on which I receive a fully executed Release and Stipulation of Settlement/Dismissal;

C. Taylor will execute a note evidencing the aforesaid obligation to pay $40,000;

D. Taylor will forgive a $3,000 note, dated September 8, 1982, that was executed by your client as the promissor;

E. Release to be executed by your client and a Stipulation of Dismissal/Settlement to be executed by you and the undersigned.

It is my belief that this letter accurately sets forth the mutual understandings of our respective clients. If this letter does not accurately set forth the understanding of your client, please advise me of that fact within five (5) days of the date of this letter. If I do not hear from you to the contrary, within five (5) days of the date of this letter, I will therefore assume that this letter does, in fact, accurately reflect the mutual understandings of our respective clients.

Respectfully,

William J. Wolf

No advice to the contrary was received within the five days. Wolf also advised the district court and the magistrate that the case was settled.

On June 15, 1984, nearly a month after the settlement negotiations, Wolf called Rabinowitz and for the first time indicated that a confidentiality agreement was necessary to the settlement.

On May 24, 1984, the district court denied defendant's motion o dismiss the complaint for lack of jurisdiction. On the same date the court signed an order stating that it had been reported to the court that the action had been settled and that the action was dismissed "without prejudice to the right, upon good cause shown within sixty (60)

days, to reopen the action if the settlement is not consummated." On July 6, 1984, the court issued a show cause order on Taylor to demonstrate why an order enforcing settlement should not be entered according to the terms of the settlement agreement expressed by Mr. Taylor's attorney in his letter of May 30, 1984, set forth verbatim above.

On August 14, 1984, "having read the papers submitted in support of and in opposition to this application and having heard the arguments of counsel, and for good cause appearing" the court entered an order enforcing settlement. Taylor appeals from this order.

Taylor argues that a settlement agreement is not binding upon the parties until all essential necessary terms have been "finalized" by the parties, that there were

disputed issued of material fact which necessitated an evidentiary hearing, that the court erred in not sealing the record, and that there was a failure of subject matter jurisdiction. We are not impressed by any of these contentions.

The demand for compensatory and punitive damages under the facts asserted brought the claim within the minimum amount in controversy requirements of 28 U.S.C. § 1332. As stated by the Supreme court, "[t]he rule governing dismissal for want of jurisdiction...is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." St. Paul Mercury Co. v. Red Cab Company, 303 U.S. 283, 288 (1938)(footnotes omitted). Based upon the nature of the present action, we are in

agreement with the district judge that the sum claimed by the plaintiff, herein, constitutes a good faith claim in excess of the $10,000 minimum requirement of 28 U.S.C. § 1332.

Because we determine that the essential facts relating to the settlement negotiations of May 22, 1984, were not disputed, no evidentiary hearing was necessary. The court found that the meeting of the minds was reached on May 22, 1984 as evidenced by Mr. Taylor's attorney's letter of May 30, 1984. Inasmuch as the court found that the settlement was reached as of that date, the later attempt to insert a confidential agreement was at best an offer for a supplementary term which was rejected, thus disposing of appellant's contention that

the contract was not "finalized." Consequently, appellant's assertion that the record should have been sealed is moot.

We have carefully considered all the contentions of the appellant.

The judgment of the district court will be affirmed in all respects.

TO THE CLERK:

Please file the foregoing opinion.

_____
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5582

DEBORAH BLACKWELL,

vs.

ARTHUR R. TAYLOR,

Appellant

(D.N.J. Civ No. 83-4645)

Present: ALDISERT, Chief Judge, SLOVITER, Circuit Judge, and MANSMANN, District Judge.*

ORDER

The petition for panel rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concured in the decision having asked for rehearing, the petition for rehearing before the original panel is denied.

BY THE COURT,

Chief Judge

DATED: May 3, 1985

* Honorable Carol Los Mansmann, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5582

DEBORAH BLACKWELL

vs.

ARTHUR R. TAYLOR,

Appellant

(D.N.J. Civ. No. 83-4645)

Present: ALDISERT, Chief Judge, and SLOVITER and MANSMANN, Circuit Judges.

ORDER

The purpose of this order is to make explicit that which was implied in the order denying panel rehearing in the above. By entering the previous order denying panel rehearing, we reject the request for a modification of the opinion.

BY THE COURT,

/s/ ALDISERT
Chief Judge

DATED: May 16, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-4645 (JWB)

DEBORAH BLACKWELL, :

Plaintiff, :

-vs- : ORDER ENFORCING SETTLEMENT

ARTHUR R. TAYLOR, :

Defendant :

This matter having been opened to the Court by McCarter & English, Esqs., attorneys for plaintiff, Deborah Blackwell by way of an Order to Show Cause why the terms of a certain settlement in this matter should not be enforced; the Court having read the papers submitted in support of and in opposition to this application and having heard the arguments of counsel and good cause appearing

IT IS on this 14th day of August, 1984

ORDERED that:

1. Arthur Taylor shall this day sign and deliver to plaintiff for filing with this Court the original Stipulation of Settlement, Promissory Note and Release, copies of which are attached to this Order, and shall comply with all the terms thereof.

JOHN W. BISSELL, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO. 83-4645

DEBORAH BLACKWELL :

Plaintiff, : OPINION

-vs- :

ARTHUR TAYLOR :

Defendant :

----------Newark, New Jersey
July 30, 1984

B E F O R E:

THE HONORABLE JOHN W. BISSELL, U.S.D.J.

A P P E A R A N C E S:

MC CARTER & ENGLISH, ESQS.
BY: DANIEL L. RABINOWITZ, ESQ.
Attorneys for Plaintiff

BATHGATE, WEGENER, WOUTERS & NEUMANN
BY: WILLIAM WOLF, ESQ.
Attorneys for Defendant

THOMAS F. BRAZAITIS
Certified Shorthand Reporter

UNITED STATES DISTRICT COURT REPORTERS
FEDERAL SQUARE, NEWARK, NEW JERSEY 07101

THE COURT: The parties were last before the Court a short while ago pursuant to cross motions to enforce settlement in this matter. Each side arguing that the settlement has slightly different terms in one material respect which will become evident shortly. On that occasion the Court reserved decision after oral argument and submission of all the papers in hopes that the parties might be able to either settle or resettle, depending on how one wants to define the term, without the need for the Court's adjudication.

I was advised by letter that no settlement efforts have been successful and, accordingly, I am prepared to decide the cross motions before me. I say cross motions, I suppose actually technically the matter is

before the Court on the plaintiff's Order to Show Cause. I meant by a cross Notice of Motion on behalf of the defendant.

For the reasons to be set forth immediately hereafter, the Court grants the application of the plaintiff pursuant to its Order to Show Cause and the Cross Motion of the defendant is denied.

The present lawsuit arises out of a Complaint filed by Deborah Blackwell on December 6, 1983, charging Arthur Taylor with assault and battery. As relief, plaintiff seeks compensatory and punitive damages together with interest, costs and reasonable attorney's fees. Jurisdiction of this Court is predicated upon diversity of citizenship, plaintiff being a resident of New York while defendant resides in New Jersey.

As mentioned a moment ago, this matter is currently before this Court pursuant initially to the filing of an Order to show Cause why a settlement agreement should not be enforced. The facts of this case material to this issue are not substantially disputed, and are as follows: On the afternoon of May 22, 1984, Counsel for the parties met at the Municipal Building in Mantoloking, New Jersey and engaged in serious settlement negotiations, both inside and outside of that building as I recall. The parties were at the Courthouse for trial on their cross and counter complaint for simple criminal assault and battery. After extensive debate over the monetary amount involved and subsequent to consultation with their respective clients, Counsel agreed that Taylor would pay $40,000 to Blackwell and forgive an indebtedness owed to him by

plaintiff in the amount of $3,000. The settlement figure was to be paid without interest in ten equal installments over a one-year period.

Other items were discussed but discarded. Accordingly, having agreed upon the terms of settlement both in amount and the payment plan, the parties proceeded to inform the Municipal Court Judge of their settlement. The Judge accepted the settlement and also at the request of Counsel admonished both parties to refrain from interfering in any way with each other in the future. The parties and Counsel then departed the Courthouse. Therefore, as the situation stood in the afternoon of May 22, 1984, the parties agreed to settle the case as delineated above. The agreement was complete in this regard, nothing

further having been assented to by either party. And no material term or condition was unresolved.

Thereafter, on May 23, 1984, Counsel for the plaintiff sent a letter to defendant's Counsel, confirming the settlement. This is annexed to the moving papers as Exhibit A to the affidavit of Mr. Rabinowitz dated June 28, 1984, referred to occasionally hereafter as the Rabinowitz affidavit.

This letter stated the amount of settlement, the payment plan, and called for the execution of General Releases and the filing of a Stipulation of Dismissal. By confirming letter dated May 30, 1984, Defense Counsel informed his adversary that the matter had indeed been settled, essentially in the terms set forth in the May 23, 1984 letter. See Exhibit B to the Rabinowitz affidavit.

Defense Counsel also addressed letters dated May 30, 1984 to this Court and to Judge Devine informing them of the settlement. See Exhibits C and D to the Rabinowitz affidavit.

Thereafter, on June 4, 1984, the plaintiff's Counsel received a letter dated May 29, 1984, from Defense Counsel that again confirmed the essence of the settlement.

Subsequently, on or about June 15, 1984, Counsel for defendant called plaintiff's Counsel and stated that he wanted to discuss three additional considerations for settlement. First, he requested a grace period for the payment of each installment. Second, he stated that Defendant Taylor insisted that the agreement contain a confidentiality statement. Finally, it was stated on behalf of Taylor that the latter did not want to settle the matter at all since he

believed that the case had been referred to plaintiff's Counsel by Judge Stern; that Judge Stern had a personal interest in the outcome of the case; that Judge Stern disliked defendant and that plaintiff's Counsel had taken the case for no fee as a favor to Judge Stern. Plaintiff's Counsel refused to agree to the first two proposals and flatly denied the third allegation.

Although Taylor apparently has dropped any accusations concerning Judge Stern, he continued to insist upon the inclusion in the settlement agreement of provisions for a grace period and confidentiality. Plaintiff consented to a ten-day grace period but refused to consent to any requirement of the confidentiality imposed upon any terms acceptable to the defendant. The instant Order to Show Cause ensued.

Based upon the foregoing basic facts, the parties each seek enforcement of the settlement but on different terms. Plaintiff claims that the agreement reached on May 22 was complete, binding and should be enforced, supplemented only by the grace period to which she also agreed. The defendant, in opposition, advances the tenuous argument that this settlement can be enforced only if itincludes not only the terms bargained for, but also those which defendant argues were tacitly understood though not expressly stated as settlement terms.

The position of defendant is not persuasive. In enforcing a settlement agreement, only those terms actually agreed upon can be enforced. In the case at bar, the settlement terms were not lengthy but nevertheless were agreed upon and constitute a

complete settlement. Specifically, the parties agreed that Taylor would forgive a debt owed him by Blackwell and that he would pay to her a specified sum in a specific number of payments over a finite period of time. While other topics for settlement may have been discussed and discarded and other ideas such as the confidentiality requirement not discussed at all and certainly not agreed to, it is eminently clear that there was a meeting of the minds as to the terms enumerated above which constitute an integrated settlement agreement. The terms of the agreement were confirmed in writing by Counsel for both sides in virtually identical language.

I might add also that prior to the arising of the discussions regarding confidentiality, statement forms of agreement

and settlement documents were exchanged by the parties, none of which had reference to the confidentiality requirement.

Support for the Court's determination is found in the recent decision of Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div. 1983). This is, of course, an action based upon diversity of citizenship and this Court locks to such recent pronouncement of State law as the governing law in the case. I'm going to at this time read that which I think is an appropriate definitive statement on the applicable law as appearing in the Pascarella case. The quotation is rather long, nevertheless I do not feel that I could state it much better than the Appellate Division has in this instance. And I quote from Page 124.

"This was a settlement agreement made between competent adults. There is no legal requirement that there be Court approval in such a case" -- citation omitted -- "and the practice of spreading the terms of the agreement on the record, although a familiar practice, is not a procedure requisite to enforcement. That the agreement to settle was orally made is of no consequence, and the failure to do no more than, as here, inform the court of settlement and have the Clerk mark the case settled has no effect on the validity of a compromise disposition." Citation omitted. "In Green v. John H. Lewis & Co., 436 F.2d 389, 390 (3 Cir. 1971), it was held that an 'agreement to settle a law suit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of the Court and even in the absence of a

writing.'" An additional 3rd Circuit citation is omitted. "We adopt these principles as consistent with the announced public policy of the jurisdiction favoring settlement of litigation. Settlements of this nature are entered into daily in our courthouse corridors and conference rooms, the Court only aware, until informed of the fact of settlement, that Counsel and the parties are working toward that desirable end. Adoption of a principle that such agreements are subject to attack because they were not placed upon the record places in unnecessary jeopardy the very concept of settlement and the process by which settlement of litigation is ordinarily achieved.

"An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a Court, absent

a demonstration of 'fraud or other compelling circumstances,' should honor and enforce as it does other contracts." Citation omitted. "Indeed, 'settlement of litigation ranks high in our public policy.' Jannarone v. W.T. Co., 65 N.J. Super 472, 476 (App. Div.), certification denied 35 N.J. 61 (1961)."

That, of course, is from the Pascarella opinion, 190 N.J. Super 124-125.

The court realizes that the parties do not protest here that there is no enforceable settlement agreement because it wasn't spread on the record either before this Court or in the Municipal Court in Mantoloking. I have read that very lengthy excerpt from the Pascarella case, however, to emphasize, if you will, that complete formality as of the time of reaching a settlement agreement is not mandatory, and furthermore, to emphasize the

very strong public policy in the law of the State of New Jersey in favor of enforcing settlements arrived at.

Applying the foregoing to the instant case, it is plain that the parties entered a binding oral agreement on or about May 22, 1984. This Court was informed of the settlement, as was the Clerk's Office who closed the case. The parties entered this agreement freely and the record before this Court is devoid of evidence of fraud or other compelling circumstances calling for denial of enforcement. Accordingly, this Court determines that the parties reached a complete and integrated settlement on May 22, 1984. Defendant may not unilaterally engraft upon that settlement supplemental conditions not agreed to by plaintiff. The settlement as

reached on May 22, 1984, supplemented by the ten-day grace period to which the parties did subsequently agree, will be enforced.

Now, there was submitted with the original papers on the Order to Show Cause a form of Order enforcing settlement, which would direct that the defendant, and I quote, "sign and deliver to plaintiff for filing with this Court the original stipulation of settlement, promissory note and release copies of which are attached to this Order and comply with the terms thereof."

Mr. Wolf, given the Court's decision on the merits of this application, which I'm sure you don't agree, are there problems or issues you would like to raise with regard to the form of Order and the exhibits thereto?

MR. WOLF: At this point, Judge, no. I haven't reviewed the form of Order or the exhibits recently.

THE COURT: All right. I'll give you the opportunity to do so. I would like, I think, this matter should be resolved more promptly than my return to duty in this courthouse on the 13th of August.

Let's go off the record, please, for a minute.

(Discussion off the record.)

THE COURT: Back on the record.

I had considered the question of whether it was appropriate for this Court in order to provide some measure of protection consistent with its ability to do so, might order the papers and the record in this case sealed. I've determined not to do that. First, since I am not imposing a

confidentiality requirement upon the parties in any event, because that was not their agreement, it would seem to me that the mere sealing of the court records would be of little real effect if either party were inclined to broadcast the terminology of the settlement. Secondly, of course, the proceedings today and the announcement of the Court's opinion have been in open court. Finally, on the basis of the decision submitted to me by Mr. Rabinowitz, and I don't have it at the bench at this time, I did review it, however, it would appear that there must be a substantial and persuasive reason for the sealing of court records normally open to the public.

In that case I believe an example was given of something in the nature of a confidentiality requirement, or by other

analogy, trade secret or something like that. Since the confidentiality requirement here is not a condition of this settlement that is a further reason this Court in this Court's view would deny the application for sealing the court record, and I will not do so.

MR. WOLF: While we have a shorthand reporter, which we did not have on Wednesday, I'd like to request at this time a stay pending appeal.

THE COURT: Stay from the entry of this Order pending appeal? All right.

Mr. Rabinowitz, you wish to be heard?

MR. RABINOWITZ: Yes, your Honor, I do.

The entry of a stay as confided to your Honor's discretion, is confided, under the circumstances, your Honor, it's now the

end of July, my client has yet to receive the first cent of the settlement payments by virtue of the continuing controversy between the parties and by virtue of the nature of the settlement. I don't believe Mr. Wolf's position would be mooted with respect to any pending appeal were he to actually go forward and begin to make -- or his client to go forward and begin to make compliance under the terms of the settlement agreement. And so we do oppose the application for a stay.

We think Miss Blackwell has waited long enough. That's why we brought this matter on before your Honor in the form of an Order to Show Cause. Because delay actually does affect the material interests of my client. However, in the event that your Honor does elect to grant the stay pending appeal, under these circumstances, your Honor, we are

entitled to a bond for the full amount of the judgment, Appellate costs under the Federal Rules of Appellate procedure, and we do insist upon a full bond in the event stay is sought.

THE COURT: All right. I gather, Mr. Wolf, you're prepared to post a bond?

MR. WOLF: Judge, I'm either prepared to post a bond, prepared to post a letter of credit, if that's better than a bond, Judge, because the issue would not be mooted if my client is successful on appeal.

THE COURT: I agree with you, the money might be spent.

MR. WOLF: Exactly.

THE COURT: Furthermore, we are not dealing here with anything that indicates a situation of poverty or the like that would indicate substantial and immediate need by Miss Blackwell for these funds.

The stay of any judgment which this Court will enter in this matter is granted upon the posting of a bond with the Clerk of this court in good and sufficient security in the sum of $65,000. And you may check with the Clerk's Office to determine the form in which that security should take, sufficient with their requirements.

MR. WOLF: Thank you, Judge.

THE COURT: Anything further?

MR. RABINOWITZ: Nothing further. Thank you very much.

THE COURT: Thank you.

(Whereupon, the matter stands adjourned.

drafts so that all the parties were together in one room or one building until the case was settled.

I suggest to your Honor that my client settled this case for one reason, and one reason only, to prevent publicity. Mr. Rabinowitz knew that because Mr. Schlesinger and myself told him that. Furthermore, Mr. Taylor, our client, told us that. I am settling this case because I want this case to remain private and not public. I suggest to your Honor there was -- if that is the argument of the plaintiff, then there was no meeting of the minds. There is no agreement. This case should proceed to discovery and trial.

THE COURT: All right, thank you. The motion for reconsideration and amendment or reversal of the Court's prior decision is

denied. I am not going to attempt to reiterate at length my determination on the original motion. I will only amplify at this point, to indicate that such references as there might have been on May 22 to the incentive of the defendant to put this matter behind him, and avoid further publicity, do not, under any circumstances involved in this case, rise to the level of substituting a binding written confidentiality agreement as a part of the settlement of the suit. The settlement was complete in its terms. The demand of the defendant for a confidentiality clause in the settlement agreement came forth a matter of weeks later. It was, if you will, an offer for a supplementary term in the settlement agreement, which was refused, and that refusal of supplementary term or an amendment to the agreement does not in this

case in any way infringe upon or reduce the effect of the settlement agreement that was in fact reached previously.

And accordingly, the motion for reconsideration is denied.

Now, with regard to the other issues, the first issue I would focus upon today, and it isn't directly related to the question of the actual form of the order, was that with regard to the plaintiff's entitlement to attorney's fees as a result of the motion which it was required to bring in order to have the Court confirm and enforce the settlement agreement.

Now, I note that Mr. Wolf directed a brief to this question, as I had suggested in our telephone conference of a couple of weeks ago. The submission from McCarter & English I

received this morning, as I read it, did not direct itself to the question of entitlement to attorneys' fees.

Mr. Lynott, do you have anything to state here orally in response to the defendant's brief focusing upon the Erie question, and accordingly, the provisions of State Rule 4:42-9, which would appear not to provide for attorneys' fees in a case such as this?

MR. LYNOTT: Your Honor, I must confess I didn't